Federal Court of Appeal  Cour d'appel fédérale

Date: 20230515

Docket: A-16-22

Citation: 2023 FCA 101

[ENGLISH TRANSLATION]

CORAM: **BOIVIN J.A.**
LOCKE J.A.
LEBLANC J.A.

BETWEEN:

CLAIRE BOREL CHRISTEN

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Montreal, Quebec, on May 11, 2023.

Judgment delivered at Ottawa, Ontario, on May 15, 2023.

REASONS FOR JUDGMENT BY: LEBLANC J.A.

CONCURRED IN BY: BOIVIN J.A.
LOCKE J.A.

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REASONS FOR JUDGMENT

LEBLANC J.A.

[1] This is an appeal from a judgment delivered by Justice Elizabeth Walker of the Federal Court (the Judge) dated December 17, 2021 (2021 FC 1440). In her judgment (the Judgment), the Judge granted in part the appellant's application for judicial review of the decision made on December 2, 2016, by a delegate of the Minister of National Revenue (the Minister) in the

second-level administrative review of the validity of the appellant's voluntary disclosure of assets held abroad (the December 2016 Decision).

[2] This disclosure (the Disclosure) was made under the Voluntary Disclosures Program (the VDP) administered by the Canada Revenue Agency (the CRA) for the purposes of subsection 220(3.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp) (the Act). This provision gives the Minister the discretionary power to waive all or any portion of any penalty or interest otherwise payable by the taxpayer.

[3] In certain circumstances, according to the policies established by the Minister and upon production of a voluntary disclosure, this ministerial power may be exercised to reduce the tax burden on a taxpayer who has not complied with some of their obligations under the Act, including, as in this case, the requirement to report income from foreign sources. Here, the appellant, who immigrated to Canada from Switzerland in 1974, failed to report the assets she held in Switzerland and the income those assets had generated annually, until the Disclosure was filed in October 2015. These assets and the income should normally have been reported with a T1135 information form filed with the CRA for at least each taxation year between 1976 and 2014. These facts, which underlie the litigation between the parties, are not in dispute.

[4] Despite the extensive administrative and judicial history of this case to date, upon which it is not useful to dwell for the purposes of this appeal, the heart of the dispute between the parties on the merits boils down to one issue: the validity of the Disclosure. The CRA is of the view that the Disclosure cannot be considered valid because, after informing the appellant in advance in a letter dated September 24, 2015, it had already performed an audit relating to information that the appellant provided a few weeks later in her Disclosure. The appellant replies that it was her intention to make a voluntary disclosure as early as March 2015, which she submits is evidenced by the mandate given to a lawyer for this purpose and the steps subsequently taken to seek the information in Switzerland required for the Disclosure. She argues that proof of this intention should prevail over the fact that an audit related to the assets she held in Switzerland was undertaken before the Disclosure was filed, even if she was already aware of the audit.

[5] However, this appeal involves rather unusual circumstances. Since the very beginning of the Federal Court proceedings, the respondent has acknowledged that the December 2016 Decision must be set aside because it was made in breach of the rules of procedural fairness, due to the fact that the decision maker in the first-level administrative review was involved in the second-level review, which gave rise to the December 2016 Decision. The respondent even introduced a motion that the appellant's application for judicial review be allowed on this basis and that the matter be referred back to the CRA for reconsideration. However, that application failed because, in her application for judicial review, the appellant did not ask that the matter be referred back to the CRA for reconsideration, but that the Federal Court order the CRA to accept

the Disclosure as voluntary and valid and declare it to be so (*Borel Christen v. Canada (Revenue Agency)*, 2017 FC 1022).

[6] Therefore, the debate before the Judge did not focus on the validity of the December 2016 Decision, but on the remedy that the Federal Court should order in the circumstances. In a detailed judgment, the Judge opted for the usual remedy on judicial review, i.e. a referral of the matter back to the administrative decision maker for reconsideration. In this case, she included with the referral directives aimed in particular at ensuring the thorough, impartial, urgent and priority processing of the appellant's file.

[7] In deciding as she did, the Judge rejected the appellant's arguments that the Federal Court was justified in rendering a "directed verdict" (*Canada (Citizenship and Immigration) v. Tennant*, 2018 FCA 132 at para. 28 (*Tennant 2018*); *Canada (Citizenship and Immigration) v. Tennant*, 2019 FCA 206, [2020] 1 F.C.R. 231 at para. 74), i.e. rendering the decision on the validity of the Disclosure instead of and on behalf of the Minister. According to the appellant, such a remedy was warranted in the circumstances of this case on the grounds that (i) the validity of the Disclosure was the only reasonable finding, and, (ii) because of the way she had handled the case to date, there was a reasonable apprehension of bias on the part of the Minister and her VDP officers, which meant that they could no longer be involved in the case.

[8] The appellant submitted the same arguments before this Court. To succeed, she must, in the absence of a clearly identifiable question of law, demonstrate that the Judge committed a palpable and overriding error in assessing the facts or in applying the facts to the applicable law.

Because this appeal concerns the Judge's exercise of the Federal Court's remedial powers on judicial review, not the validity *per se* of the December 2016 Decision, it is the standard set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (*Housen*) that applies and not, as the appellant argues, the standard set out in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 (*Agraira*) specific to appeals on issues decided in an application for judicial review (*Canada v. Long Plain First Nation*, 2015 FCA 177 at paras. 88-89; *Tennant 2018* at para. 27; *Sturgeon Lake Cree Nation v. Hamelin*, 2018 FCA 131 at paras. 37 and 51; *Doyle v. Canada (Attorney General)*, 2022 FCA 56 at para. 6 (*Doyle*); *Burlacu v. Canada (Attorney General)*, 2022 FCA 197 at para. 11 (*Burlacu*); *Northern Inter-Tribal Health Authority Inc. v. Yang*, 2023 FCA 47 at paras. 45-50 (*Yang*)).

[9] At the hearing, counsel for the appellant tried to persuade us that *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 (*Vavilov*), allows the standard of review applicable to appellate courts to be redefined in cases where, as here, these courts are called upon to consider a trial decision ruling on the appropriateness of rendering a "directed verdict" in a judicial review proceeding. He was unable to cite any appellate court authority that could support his claim. One thing is certain, this argument is inconsistent with this Court's post-*Vavilov* case law, in which it has continued to apply the standard of palpable and overriding error to these issues, as evidenced by *Doyle*, *Burlacu* and *Yang*, referred to above. Beyond the fact that *Vavilov* did not deal with the standard of appellate review except in cases of statutory appeals—which is not the case here—until then deemed to be judicial reviews for the purposes of the choice of standard of review (and which must henceforth be addressed, like any

other appeal, as being subject to the standard of review in *Housen*), this contention is without merit.

[10] We must bear in mind that the standard of palpable and overriding error imposes a heavy burden on the person who must meet it. An error is palpable if it is plainly seen and if all the evidence need not be reconsidered in order to identify it and is overriding if it has affected the result (*Hydro-Québec v. Matta*, 2020 SCC 37 at para. 33). This Court has already said that when arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. "The entire tree must fall" (*Canada v. South Yukon Forest Corporation*, 2012 FCA 165 at para. 46).

[11] After having carefully reviewed the record and the appellant's written and oral representations, I am of the opinion that the appellant has not met this burden.

(a) Is the finding that the Disclosure was voluntary the only possible outcome for the Minister?

[12] As the Judge rightly pointed out, relief referred to as a "directed verdict" is rather exceptional in administrative law. This situation reflects the legislature's intention to entrust certain matters to the administrative decision maker, not to the courts (*Vavilov* at para. 142). One of the recognized exceptions giving rise to such relief is where only one inevitable decision would be available to the administrative decision maker on the merits if the case were remitted for reconsideration (Judgment at paras. 23-24; *D'Errico v. Canada (Attorney General)*, 2014 FCA 95 at para. 16). In such a case, returning the matter back to the administrative decision

maker would be an exercise in futility (*Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299 at paras. 46 and 52–53 (*Stemijon*)).

[13] The appellant argues that this would be the case here, since the December 2016 Decision is in no way reasonable because it: (i) failed to meet the objective of fairness that underlies subsection 220(3.1) of the Act, (ii) resulted from an "order" received from the CRA Audit Directorate, (iii) is strictly based on Information Circular IC00-1R4 (the Circular), which fettered the scope of the discretionary power set out in subsection 220(3.1), and (iv) is at odds with the principle of promissory estoppel, since during the first administrative review, the voluntary nature of the Disclosure did not appear to be a concern for the CRA.

[14] The Judge considered—and rejected—each of these arguments.

[15] Regarding the argument relating to the fairness objective of subsection 220(3.1) of the Act, the Judge, while noting the "highly discretionary" nature of the power vested in the Minister under this provision, pointed out that this objective also requires that requests for relief made by taxpayers under this provision be dealt with by the CRA "in a consistent and transparent manner in light of the facts and evidence supporting their individual requests" (Judgment at para. 29).

[16] Like the Judge, I would add that, for taxpayers who wish to rely on this provision, subsection 220(3.1), which is applied in particular through the VDP, is triggered by a failure on their part to report information to the CRA as the Act requires. The objective of fairness, therefore, must be understood from the standpoint of the equitable treatment of all applications

for relief made to the Minister in a context where there is no right to relief as such, not with a view to remedying an injustice. In my opinion, the Judge made no palpable and overriding error in finding as she did on this point.

[17] The argument that the December 2016 Decision was somehow dictated by a directive email dated May 6, 2016, from the CRA Audit Directorate does not stand up to scrutiny. As the Judge noted, there is no evidence that this email, which was sent as part of the administrative review preceding the one that led to the December 2016 Decision, was brought to the attention of those who played a role in making that decision at the time they were conducting this second review. Ultimately, this argument is based largely on conjecture. The Judge made no palpable and overriding error in rejecting it.

[18] In my view, the same finding is warranted with respect to the appellant's argument on the principle of promissory estoppel. I note that the appellant submits that the CRA officers who conducted the first administrative review behaved in such a way as to give her the impression that the voluntary nature of the Disclosure, normally determined at the start of the process, had been established, as several months had elapsed between the filing of the Disclosure on October 20, 2015, and the first administrative decision rendered in May 2016. The Judge found that the facts in the record did not establish that a promise, even a tacit one, had been made to the appellant during this period and that, given the number of taxation years at issue, it was normal for the VDP to require additional information from the appellant (Judgment at para. 45).

[19] Promissory estoppel requires proof of a clear and unambiguous promise (*Immeubles Jacques Robitaille inc. v. Québec (City)*, 2014 SCC 34, [2014] 1 S.C.R. 784 at para. 19). In light of all the facts in the record, the Judge did not, in my view, commit any error in dismissing this claim that would warrant intervention by this Court. Once again, the standard of palpable and overriding error imposes a heavy burden, and here too, the appellant has failed to meet it.

[20] Finally, the Judge provided an extensive discussion of the argument that the Minister could only have found that the Disclosure was voluntary had she not limited her discretionary power by using the Circular as the sole framework for analysis, contrary to the instructions of our Court in *Stemijon*.

[21] She rejected this argument after a rigorous analysis of the state of the law on the issue and the evidence in the record, including the notes and report of the CRA officer responsible for conducting the second administrative review of the Disclosure and making a recommendation to the Ministerial Delegate empowered to render the eventual December 2016 Decision. Like her, I note that, far from having blindly followed the Circular, the officer considered the appellant's rationale for her delay in filing the Disclosure and undertook consultations within the VDP to validate the decision he was proposing to resolve what he considered to be a [TRANSLATION] "dilemma". As the Judge noted, the evidence demonstrates not only that this officer considered the requirements of the Circular, but also "that he was aware of the importance of analyzing all relevant facts, including the [appellant's] intentions in her meetings with her counsel in March and May 2015 and the principles of fairness" (Judgment at para. 37).

[22] The Judge found that there were at least two possible outcomes to the issue of the voluntary nature of the Disclosure. One favoured the appellant's position. It was based on the fact that she had intended to make a Disclosure since March 2015, as evidenced by the steps taken in this regard at the time. The other favoured the invalidity of the Disclosure. It was based on the fact that, despite this intention, the appellant did not file the Disclosure until after she was notified by the CRA that an audit of her Swiss assets was to be initiated, and therefore that a compulsory measure had been taken against her within the meaning of the Circular (Judgment at para. 47).

[23] The Judge agreed with the respondent that there was an important distinction between the date the information was actually disclosed to the VDP and the date the taxpayer planned and took steps to file a disclosure. According to her, this was the case because:

> [The appellant's] decision to begin to identify the scope of a possible disclosure is not the end of the story. The VDP could not treat it as such either. Intentions can change, as can the scope of the proposed disclosure. In the case at hand, the evidence in the record indicates that the Disclosure was not ready or complete in May 2015. The potential scope of the Disclosure could not be established without further investigation by [the appellant] and her counsel. Therefore, the VDP officers' analysis of the steps taken by the applicant and her counsel from May to October 2015 and the time gap between her learning of the Audit and the filing of her Disclosure were not wrong. This was a necessary part of a comprehensive analysis of the file, the legislation, the case law and the Circular.
>
> (Judgment at para. 42)

[24] The Judge also said she was satisfied, subject to the necessary fine distinctions, that the process followed by the Minister that led to the December 2016 Decision did not violate the teachings of our Court in *Stemijon* (Judgment at para. 29). In my view, this finding is irrefutable.

[25] As the Court stated in *Stemijon*, an administrative decision maker's reliance on a policy statement is not in itself a cause for concern (*Stemijon* at para. 31). It even noted the "useful and important role" these statements play in public administration, in that they "allow those subject to administrative decision-making to understand how discretions are likely to be exercised" (*Stemijon* at para. 59). Their use is permitted as long as they serve as a guide to the exercise of discretion and do not "dictate in a binding way how that discretion is to be exercised" (*Stemijon* at para. 60). Based on all the evidence in this case, the Judge found that this line had not been crossed.

[26] Before this Court, the appellant reiterated the arguments she made before the Judge, in the hope that we would come to a different conclusion. However, as I have already said, that is not our role. It is not for appellate courts to second-guess the weight the trial judge assigned to the various pieces of evidence (*Nelson (City) v. Mowatt*, 2017 SCC 8, [2017] 1 S.C.R. 138 at para. 38).

[27] The Judge found that the Minister did not fetter her discretion in this case and that there was more than one possible outcome to the substantive issue on which the fate of the Disclosure depended. As we have seen, the correctness of the Judge's finding in this respect must be reviewed on the standard of palpable and overriding error. It is not enough to express disagreement with this finding, as the appellant does, to meet this standard of review, especially in the context of the exercise of a highly discretionary power.

[28] In short, I am of the view that the Judge did not commit any error warranting this Court's intervention in rejecting the appellant's argument that, in this case, the only possible conclusion was that the Disclosure was voluntary and valid.

(b) Can the Minister still render an impartial decision if the matter is referred back to her?

[29] The appellant argues that, due to bias, the Minister is no longer institutionally empowered to decide the validity of the Disclosure, and that referring the matter back to her for reconsideration would therefore not be an appropriate remedy in the circumstances and would perpetuate an endless administrative and legal whirlwind that has persisted since 2015.

[30] This apprehension of bias allegedly stems from: (i) the "order" received via the Audit Directorate's May 2016 email, which, according to the appellant, affected the impartiality of the entire VDP, not only of those who were able to participate in the decisions of the two levels of the administrative review procedure; (ii) efforts to conceal this "order"; (iii) the involvement of the first-level decision maker in the process that led to the December 2016 Decision; (iv) the selection of a subordinate as affiant for the purposes of the respondent's response to the application for judicial review, a choice that was allegedly made to [TRANSLATION] "'protect' his supervisors from foreseeable criticism as to the manner in which they allowed themselves to be subjugated by the Audit Directorate and submitted to its will" (Memorandum of the Appellant at para. 77); (v) [TRANSLATION] "incredible statements hurled by [this affiant] during his examination under oath" (Memorandum of the Appellant at para. 78); (vi) [TRANSLATION] "implausible" answers to undertakings required of the affiant during his cross-examination

(Memorandum of the Appellant at para. 81); and (vii) a third—unfavourable—decision rendered by the VDP during the course of the judicial review proceedings, on the voluntary nature of the Disclosure.

[31] Although she expressed the view that the Audit Directorate's May 2016 "order" may have tainted the decision made during the first administrative review, the Judge found that nothing in the evidence links this "order" to the process that led to the December 2016 Decision. Similarly, if the first decision maker's participation in the process that led to the December 2016 Decision compromised the procedural fairness of that process, as the respondent acknowledges, the Judge found that this did not affect the impartiality expected from the other VDP officers. The Judge also rejected the "serious allegations" that the affiant was chosen to conceal facts. She found that the choice of this affiant was "obvious and reasonable . . . given the imminent or actual retirement of [the person who made the December 2016 Decision]" (Judgment at para. 63). The Judge noted that the issue of the affiant's impartiality had been settled in an interlocutory judgment that the appellant did not appeal (Judgment at para. 65).

[32] The Judge also found that the appellant did not establish "her generalized allegations of misconduct on the part of each of the participants involved in her case" (Judgment at para. 67). She also rejected the argument regarding the unfavourable decision by the VDP, later overturned, by the VDP on the issue of the voluntary nature of the Disclosure after the application for judicial review was filed. She ruled that the decision did not constitute evidence of bad faith, because this matter "remains to be determined through a fair, comprehensive, and clearly independent process" (Judgment at para. 68).

[33] Finally, the Judge dismissed the argument that remitting the matter to the Minister for reconsideration would only exacerbate the "endless administrative and judicial whirlwind" in which the appellant says she finds herself (Judgment at para. 69). She pointed out that the appellant insisted on seeking a "directed verdict", despite the warning that the Federal Court gave her regarding the likelihood of success of such an application for a remedy, which the Judge cited in paragraph 69 of the Reasons for Judgment. According to the Judge, the appellant's insistence had contributed to prolonging the proceedings, just as the disruption caused by the COVID-19 pandemic had also done.

[34] I am of the view that, contrary to the appellant's claims, the Judge correctly directed herself in law and, with regard to the facts of this case, did not commit any palpable and overriding error in finding as she did on this issue of institutional bias. It is settled law that, to be reasonable, an apprehension of bias must be one held by a reasonable person (*Committee for Justice and Liberty et al. v. National Energy Board et al.*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369 at 394; *Davidson v. Canada (Attorney General)*, 2021 FCA 226 at para. 15). In other words, it must be objectively observable; it cannot be subjective. These are the principles reiterated in *Ordre des audioprothésistes du Québec c. Chanteur* rendered by the Court of Appeal of Québec (1996 CanLII 6273 (QC CA) (*Ordre des audioprothésistes du Québec*)), upon which the appellant relied to establish its argument of bias.

[35] In that case, the Court of Appeal of Québec pointed out that it was [TRANSLATION] "dealing with quite an exceptional case, where the negligence of the Order and its officers, their apparent bad faith, and their relentless efforts to settle a personalized vendetta tainted, as the

Superior Court judge implies, with xenophobia" that did not indicate that referring the matter back to the administrative decision maker would provide a guarantee of impartiality for the person concerned (*Ordre des audioprothésistes du Québec* at para. 10).

[36] Here, the appellant made a series of allegations of bad faith, lies, wrongdoing, and concealment, but she nevertheless had to prove them. Such allegations—which, as the Judge noted, are excessively serious—cannot be based on an amalgam of suppositions, general assertions, hypotheses and extrapolations. Unfortunately for the appellant, that is indeed the case here. This is a far cry from the evidence produced in *Ordre des audioprothésistes du Québec*.

[37] Even considered on a standard of correctness, as counsel for the appellant urged the Court to do at the hearing, my finding on the allegations of institutional bias submitted by the appellant does not change, because the facts adduced in evidence before the Federal Court do not support a different conclusion.

[38] I see no reason to intervene in the choice of relief ordered by the Judge. I note that the Judge was aware of the failures that occurred in the first- and second-level administrative reviews and therefore, in the disposition of the Judgment, she prescribed strict conditions aimed at ensuring a quick, independent, transparent and rigorous conclusion of the reconsideration that the Minister will have to undertake. Obviously, the Minister cannot ignore these conditions, and they will be considered in the assessment of the reasonableness of the forthcoming decision on the merits of the dispute between the parties and of the compliance with the rules of procedural fairness in reaching that decision.

[39] I would not intervene any further, as the appellant asks this Court to do, in the Judge's finding on costs since nothing in the record reveals any abusive behaviour on the part of the respondent in the conduct of the Federal Court proceedings that might have justified awarding costs on a solicitor-client basis, as the appellant seeks.

[40] I would therefore dismiss this appeal with costs to the respondent, considering the outcome that I propose.

[41] A final strictly procedural point. The respondent asks us to amend the style of cause to substitute the Attorney General of Canada for the CRA as respondent. In light of rule 303(1) of the *Federal Courts Rules*, SOR/98-196, this request appears to me to be well founded (*Grewal v. Canada (Attorney General)*, 2022 FCA 114 at para. 14; *Doyle* at para. 11). I would therefore amend the style of cause accordingly, in these reasons and in the forthcoming judgment.

"René LeBlanc"
J.A.

"I agree.
Richard Boivin J.A."

"I agree.
George R. Locke J.A."

Certified true translation
Vera Roy, Senior Jurilinguist

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-16-22
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CONCURRED IN BY:	BOIVIN J.A. LOCKE J.A.
DATED:	MAY 15, 2023

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